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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 334

JOSEPH E. SEAGRAM & SONS, INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

JOSEPH E. DAVIES,
RAYMOND N. BEEBE,
ALFRED D. VAN BUREN,
Counsel for Petitioner.

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No. 334

JOSEPH E. SEAGRAM & SONS, INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Comes now Joseph E. Seagram & Sons, Inc., by its attorneys, Joseph E. Davies, Raymond N. Beebe and Alfred D. Van Buren, and prays that a writ of certiorari issue from this Court to review the judgment of the Court of Claims entered in the above cause on February 3, 1941, dismissing its petition (R. 10). A motion for new trial made by petitioner was denied May 5, 1941 (R. 10).

Summary and Statement.

This is an action for the recovery of $1,452.20, same being the then Internal Revenue tax of $2.00 per proof gallon on 726.6 proof gallons of spirits, viz., gin, which were lost

and destroyed in petitioner's distillery at Lawrenceburg, Ind., on August 24, 1936.

In connection with and as a part of its distillery, petitioner had provided a cistern room or building, as required by law, containing receiving cisterns or tanks into which all spirits produced in its distillery were conveyed and held prior to being drawn off into casks or packages and removed into the warehouse. At petitioner's distillery, the cistern room was located about 450 feet from the distillery building and spirits were transferred or pumped from the distillery to the cistern room by pipe lines. These pipe lines were connected with manifolds located in a room constructed on a balcony on the outside of the cistern room, the door thereto being secured with a Government lock, the key to which was required to be held at all times by the Government officer (storekeeper-gauger) in charge of the plant. Separate pipes ran off from the manifolds to each of the receiving cisterns or tanks in the cistern room, the flow of spirits to the respective cisterns or tanks being regulated and controlled by valves attached to the pipes at the manifolds. In order to change the flow of spirits, it was necessary to call the storekeeper-gauger who would unlock the door to the balcony room and the valves would then be adjusted to allow the spirits to flow into the desired cistern or tank (R. 4-5).

On the night of August 24, 1936, a pumping order had been issued by petitioner's employee directing that a quantity of gin be pumped from the so-called gin house of the distillery into cistern or tank No. 14 in the cistern room which was empty at the time. Such employee, however, failed to properly adjust the valves and when the pumping began the gin ran into cistern or tank No. 15 which was full or partly full, instead of into cistern or tank No. 14, resulting in an overflow from said cistern or tank No. 15

of 726.6 proof gallons constituting the loss in question (R. 6).

Such loss was promptly reported and a claim for the remission of the tax presented which was denied. The tax was then assessed by the Commissioner and paid to the Collector pursuant to his demand. A claim for refund was then presented which was also rejected (R. 6) and thereafter this action to recover the said tax was instituted in the Court of Claims hereinafter referred to as "the Court" (R. 1). (Judicial Code, Sec. 145 (1); 28 U. S. C. A. 250 (1)). As above stated, judgment was entered February 3, 1941, dismissing the petition, the decision of the court being reported in 36 Fed. Sup. 1013 (R. 10). Petitioner thereupon made a motion for a new trial which was denied May 5, 1941 (R. 10).

Statutes Involved.

The establishment and operation of distilleries were, at the time of the loss in question, under the provision of various Internal Revenue Laws (now Internal Revenue Code) and Regulations issued pursuant thereto. While such provisions are numerous, reference will be made only to those directly relevant to the issues presented. Unless otherwise indicated, such references will be to sections of Title 26 of the United States Code, 1934 Edition, in effect at the time, with corresponding sections of the Internal Revenue Code noted. The taxing provisions referred to in the court's opinion are set forth below. Other relevant statutes are set forth in the Appendix. (pp. 20-23).

26 U. S. C. A. 1150 (a) (1); (Sec. 2800 (a) (1) I. R. C.):

> *Tax Rate:* "On and after January 12, 1934, there shall be levied and collected on all distilled spirits produced in or imported into the United States an internal-revenue tax at the rate of $2.00 on each proof

gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn from bond."

26 U. S. C. A. 1150 (b); (Sec. 2800 (b) I. R. C.):

"*Time for payment; bonded distilled spirits; distilled spirits not bonded:* The tax upon any distilled spirits removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time within the period of limitation provided in section 1432, when knowledge of such fact is obtained by the Commissioner, be assessed by him upon the distiller of the same, * * *".

Questions Presented.

As above stated, the only issue involved is whether the tax on spirits lost in the distillery was legally and properly assessed. This question, however, involves the interpretation and construction of the foregoing statutory provisions and petitioner contends that the court has erred in this regard. The questions presented, therefore, may be considered under the following assignments of error:

1. In holding that the tax sought to be recovered was due and properly assessed under 26 U. S. C. A. 1150 (b).

2. In holding that 26 U. S. C. A. 1197 had no application to the case at bar.

3. In holding that if 26 U. S. C. A. 1197 were applicable, petitioner is entitled to relief only if the spirits were lost without negligence on its part.

The court has held that while the loss was of gin, the spirits subject to tax, viz., alcohol, had come into "existence as such", that the tax had attached thereto (26 U. S. C. A. 1150 (c)) and, having attached, "it must be payable

at some time thereafter". Based on this reasoning, the court then held that "since the spirits were never deposited in bonded warehouse, the provision fixing the time of payment as the time when they were withdrawn therefrom, cannot be applicable" (26 U. S. C. A. 1150 (a) (1)) but "that the case comes squarely within the provision for the payment of the tax when it is removed from a distillery to a place other than a bonded warehouse" (26 U. S. C. A. 1150 (b)) and that the assessment was made under said section (R. 8-9).

The petitioner, however, contends that, having produced 80 per centum of the surveyed capacity and accounted for all the spirits produced during August 1936, as required by 26 U. S. C. A. 1197, (Appendix, p. 22), including the spirits lost, it was not liable to assessment for such loss and that such loss did not constitute a "removal" under 26 U. S. C. A. 1150 (b) (*supra*, p. 4). The assessment not having been made under Section 1197, as held by the court, it must be assumed that there was no deficiency, no excess materials used and that petitioner had fully accounted for all spirits produced.

Reasons for Allowance of the Writ.

1. The decision and judgment of the Court of Claims is unjustified, unwarranted and contrary to law.

2. The question presented has not heretofore been considered by the courts, except in an action previously instituted by petitioner, involving a similar loss (*Seagram* v. *Smith, Collector*, 113 F. (2d) 357) referred to in the court's opinion (R. 10) and discussed in petitioner's brief attached.

3. The question presented is of great importance not only to distillers but to the Government.

4. If spirits lost and destroyed in a distillery are to be treated as having been "removed from the place where they

were distilled and not deposited in bonded warehouse", thereby making same subject to assessment as held by the court, a very serious problem is encountered, for losses are certain to occur in distilleries from various causes and distillers will be granted no relief whatever.

5. The decision herein sought to be reviewed seriously affects the operations of petitioner as distiller, and all other distillers and it is necessary to obtain a final determination as to the tax liability for losses occurring in a distillery.

WHEREFORE, it is respectfully submitted that the writ of certiorari be granted.

Respectfully submitted,

JOSEPH E. DAVIES,
RAYMOND N. BEEBE,
ALFRED D. VANBUREN,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 334

JOSEPH E. SEAGRAM & SONS, INC.,
Petitioner,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Official Report of Opinion Below.

The opinion of the Court of Claims is reported in 36 Fed. Sup. 1013 (R. 7).

Jurisdiction.

The jurisdiction of this Court to issue the writ of certiorari is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939 (28 U. S. C. A. 288 (b)). The judgment of the Court of Claims, dismissing the petition was entered February 3, 1941 (R. 10). A motion for new trial was filed April 4, 1941, and

denied May 5, 1941 (R. 10), and the time in which this application might be made did not begin to run until after the disposal of such motion on May 4, 1941 (*U. S.* v. *Seminole Nation,* 299 U. S. 417).

Statement.

This action is for the refund or recovery of $1,452.20, same being the Internal Revenue tax of $2.00 per proof gallon on 726.6 proof gallons of spirits, gin, lost and destroyed in petitioner's distillery on August 24, 1936. The loss occurred while such spirits were being pumped or transferred by pipe line from the distillery to the cistern room. Petitioner's employee failed to make the necessary adjustment of the valves controlling the flow of the spirits to the proper tank in the cistern room and, instead of going into a tank which was empty as intended, the spirits ran into a tank which was filled or partly filled resulting in an overflow of 726.6 proof gallons being the loss in question. The loss was promptly reported to the Bureau as required and a claim for the remission of the tax presented which was denied. The tax was then assessed and paid, a claim for refund filed which was also rejected and thereafter this action was brought in the Court of Claims to recover the tax.

The only questions presented are questions of law, it being conceded that the spirits were lost and destroyed in the distillery under the circumstances set forth above. In dismissing the petition, the court held, as stated in the opinion, that the tax became due and was assessed under the provisions of 26 U. S. C. A. 1150 (b); (Sec. 2800 (b) I. R. C.) (*supra,* p. 4), on the theory that the spirits so lost had been "removed from the place where they were distilled and not deposited in bonded warehouse as required by law". It was also held that 26 U. S. C. A. 1197 (Sec. 2846 I. R. C.) (Appendix, p. 22), relating to the distiller's ac-

count for all spirits produced in the distillery on which petitioner relies, had no application to the case at bar.

I.

The court erred in holding that the tax sought to be recovered was due and properly assessed under 26 U. S. C. A. 1150 (b).

26 U. S. C. A. 1150 (b) provides as follows:

> "The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, * * * when knowledge of such fact is obtained by the Commissioner be assessed by him upon the distiller of the same * * *".

It is clear from the above provision that the spirits must be "removed" or taken from the distillery and not deposited in warehouse. This is a logical requirement in view of the provisions of 26 USCA 1171 (Sec. 2820 I.R.C.), viz.,

> "On the third day after the spirits are conveyed into such cistern they shall be drawn off into casks, * * * and be removed directly to the distillery warehouse. * * *".

It is the failure to make this "removal" that authorizes the Commissioner to assess under Section 1150 (b) above. The spirits in question were not "removed from the place where they were distilled" but were lost *in* such place. Section 1150 (b) was section 14 of the original Act of July 20, 1868; section 15 of said original Act provided for the establishment and control of the distillery warehouse (26 USCA 1225) and Section 1171 above requiring the spirits to be removed directly to such warehouse, was section 16 of the original Act. There are other provisions of law which

show conclusively that the spirits must have been in existence *outside* the distillery to give the term "removed" its correct interpretation, if this becomes necessary. 26 USCA 1286 (Sec. 2912 I. R. C.) provides, in part, as follows:

> "All distilled spirits *found* elsewhere than in a distillery * * * not having been removed therefrom according to law, shall be forfeited to the United States".

26 USCA 1287 (Sec. 2913 I. R. C.) provides, in part, as follows:

> "Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse, or other bonded warehouse provided by law * * * he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed * * * and shall be fined * * *".

The similarity of the language used in the above sections to that in Section 1150 (b) is impressive. Other provisions may be mentioned, viz. 26 USCA 1189 (Sec. 2838 I. R. C.) prohibiting the removal of spirits in the absence of the storekeeper-gauger; 26 USCA 1221 (Sec. 2870 I. R. C.) prohibiting the removal of spirits from the distillery "at any time other than after sun-rising and before sun-setting".

As defined by Webster, to "remove" means "to move away from the position occupied; to cause to change place; shift". Applying these definitions to the term "removed" in Section 1150 (b), it would be necessary "to move" the spirits "away from" the distillery, or "to cause" the spirits "to change place" or to "shift" the spirits from the distillery.

II.

The court erred in holding that 26 U. S. C. A. 1197 has no application to the case at bar.

Section 1150 (b) above affords no relief whatever for losses in a distillery if such losses are to be regarded as

"removals" under said section. The spirits lost consisted of gin which concededly had been produced from alcohol previously distilled and was on the way to the cisterns. The Court held that the alcohol having come into existence as such the tax had attached thereto (26 U. S. C. A. 1150 (c)) (Appendix, p. 20) and, having attached, "it must be payable at some time thereafter" (R. 9). Petitioner concedes that the tax had attached but it does not agree that the tax necessarily must be paid thereafter. Section 600 of the "Revenue Act of 1918" (February 24, 1919) as amended by the "Liquor Taxing Act of 1934" (January 11, 1934) provided that the tax was "to be paid by the distiller * * * when withdrawn, and collected under the provisions of existing law" (Appendix, p. 20). As codified in 26 U. S. C. A. 1150 (a) (1) the tax was "to be paid by the distiller * * * when withdrawn from bond" (*supra*, p. 4). Although there is a difference in these provisions, the codifiers undoubtedly intended them to mean the same and that the phrase "withdrawn from bond" covered all that was included in collecting "under the provisions of existing law". In any event, the Court held that the tax was not due or assessed under the above taxing provision because the spirits "had not been deposited in a bonded warehouse" and therefore could not have been "withdrawn from bond" (R. 9). Seeking a provision to warrant the collection of the tax which had previously attached, the Court selected Section 1150 (b) "sinne" as stated in the opinion "there is no provision of law which has been called to our attention, or of which we are aware, that exempts a distiller from payment of the tax because the liquors were lost or destroyed in the process of being removed from the distillery to the cistern room" (R. 9). The "room or building" containing the cisterns is an essential part of the distillery (26 U. S. C. A. 1171; Sec. 2820 I. R. C.) (Appendix, p. 21). A loss occurring "in the process of being removed" from

one part of the distillery to another part of the distillery, which was what happened here, cannot be a "removal" *from* the distillery as required under Section 1150 (b).

All conditions and restrictions surrounding the production of distilled spirits are prescribed by law for the sole purpose of protecting and securing payment of the tax "when withdrawn from bond" or, as now contemplated, when "removed from the place where they were distilled and not deposited in bonded warehouse as required by law". As stated by this Court in *United States* v. *Ulrici,* 111 U. S. 38; 4 S. Ct. 288—

> "It is clear, even from a cursory reading, that the well considered and minute provisions of the Revised Statutes * * * entitled 'Internal Revenue', were adopted with one purpose only, namely, to secure the payment of the tax imposed by law on distilled spirits, and all the penalties, forfeitures, fines, and imprisonments prescribed by the chapter mentioned above have that end in view. If the tax on distilled spirits were repealed, all the ingenious and complicated provisions of the chapter would become useless and insensible."

Avoiding the temptation to follow the course of spirits through the distillery, it will suffice to say that all spirits produced must be conveyed into the cisterns and from there removed to the warehouse (26 U. S. C. A. 1171; Sec. 2820 I. R. C.) (Appendix, p. 21). There is one exception to this rule, however, and it may be material. Under the Act of June 26, 1936 (Sec. 2883 I. R. C.) "spirits produced at registered distilleries and reduced in the receiving cisterns in such distilleries to not more than one hundred and fifty-nine degrees of proof and not less than one hundred degrees of proof * * * may be drawn into approved containers and * * * tax paid in such approved containers in such cistern room, without being entered into an internal revenue bonded warehouse." It was also provided in said Act

(Sec. 2916 I. R. C.) that distillates containing 1 per centum or more of Aldehydes or fusel oil "removed in the course of distillation" pursuant to regulations, could "be removed from such distillery for denaturation or destroyed" and when so denatured or destroyed would not be subject to the tax. Here are spirits which can be "removed from the place where distilled" and are *not* required to be "deposited in warehouse". As to such spirits it is at least doubtful that on removal of such spirits the tax could be assessed under Section 1150 (b).

Under the law a distiller was required to keep a record of all materials used in the distillery, the number of gallons of spirits distilled, the number of gallons placed in warehouse, etc. (26 U. S. C. A. 1192; Sec. 2841 I. R. C.) and to render a monthly report or return thereof to the Collector who forwarded a copy to the Commissioner (26 U. S. C. A. 1195; Sec. 2844 I. R. C.). The producing capacity of the distillery was carefully determined by a "survey" (26 U. S. C. A. 1168; Sec. 2817 I. R. C.) and the Commissioner thereby knew the quantity that could be produced. (This survey requirement has been waived by the Secretary by regulation (T. D. 4794) issued March 11, 1938 pursuant to the above Act of 1936) (Appendix, p. 23), footnote). We now come to the provision of law which, as petitioner contends, exempts a distiller from payment of tax on spirits destroyed in the distillery, namely, 26 U. S. C. A. 1197 (Sec. 2846 I. R. C.) the material portions of which are as follows:

> "On receipt of the distiller's return in each month, the Commissioner shall inquire and determine whether the distiller has accounted for all the grain or molasses used and all the spirits produced by him in the preceding month. If he is satisfied that the distiller has reported all the spirits produced by him, and the quantity reported is found to be less than 80 per centum of the producing capacity of the distillery as estimated according to law, he shall make an assessment for such

> deficiency at the rate of tax imposed by law for every proof gallon. * * * and if the Commissioner shall find that the distiller has used any grain or molasses in excess of the capacity of his distillery * * *, he shall make an assessment against the distiller at the rate of tax imposed by law for every proof gallon of spirits that should have been produced from the grain or molasses used in excess. * * * IF THE COMMISSIONER FINDS THAT THE DISTILLER HAS NOT ACCOUNTED FOR ALL THE SPIRITS PRODUCED BY HIM, HE SHALL, FROM ALL THE EVIDENCE HE CAN OBTAIN, DETERMINE WHAT QUANTITY OF SPIRITS WAS ACTUALLY PRODUCED BY THE DISTILLER AND AN ASSESSMENT SHALL BE MADE FOR THE DIFFERENCE BETWEEN THE QUANTITY REPORTED AND THE QUANTITY SHOWN TO HAVE BEEN PRODUCED AT THE RATE OF TAX IMPOSED BY LAW FOR EVERY PROOF GALLON. * * *"

The following provision of the Regulations, based on the above provision and in effect at the time of the loss, is most important:

> "The product for which the distiller is entitled to receive credit as against the required product under the survey is that quantity of finished spirits deposited in the cisterns in the cistern room by or before midnight of the last day of the month and cannot include any unfinished spirits remaining outside the cistern room at the close of the month". (Regulations 8, page 51.)

26 U. S. C. A. 1198 (Sec. 2847 I. R. C.) affords relief to distillers for failure to produce the required percentage and for use of excess materials in certain cases but these provisions are not material for there was no deficiency in production or excess materials used. As held by the Court, the assessment was not made under above Section 1197. This being true, it must be accepted that petitioner fully accounted for all spirits produced during August, 1936, including the spirits lost for such loss was duly reported.

The loss did not result in a deficiency. Had this occurred, petitioner would have been assessed for such deficiency, not the loss, and petitioner would have been compelled to seek relief under Section 1198 which probably would have been denied because of the negligence involved.

The purpose of the distillers record and monthly return was to enable the Commissioner to determine three things, namely, (a) that the distiller had produced the required 80 per centum of the surveyed capacity; (b) that he had accounted in spirits for any excess materials used, and (c) that he had accounted for *all* the spirits produced. Under Section 1197 the account is used as the basis for two assessments, (a) for any deficiency and use of excess of materials, and (b) failure to show all spirits produced. The account might show correctly all spirits produced but if there was a deficiency, there would be an assessment. Likewise there might be an over-production but if all the spirits were not accounted for, there would be an assessment.

Under the Act of June 26, 1936 (Appendix, p. 23, footnote) authorizing the Secretary to waive the survey requirements (26 U. S. C. A. 1168; Sec. 2817 (b) I. R. C.), the Secretary was also authorized to relieve the distiller from such requirements of above Section 1197 "and of such other provisions of law relating or incidental to survey requirements" as might be waived without danger to the revenue. The fact that the account was not to be confined to the purpose of determining deficiencies and use of excess materials, is shown by the action taken by the Secretary pursuant to the above authority. By above regulation (T. D. 4794) issued March 11, 1938, he not only waived the survey requirement but also relieved distillers from the possibility of being assessed for deficiency and use of excess material, as follows:

> "(d). From so much of the provisions of * * * (U. S. C. A. 1934, Ed. Title 26, Sec. 1197), as makes the

> distiller liable to an assessment for a deficiency in producing less than 80 per centum of the producing capacity of the distillery as estimated according to law; and as make him liable to an assessment for the tax upon the spirits that should have been produced from the material found to have been used in excess of the capacity of the distillery for any month as estimated according to law".

The distiller was not relieved from keeping the record and making his monthly return. The Commissioner was still required to examine the account and determine whether the distiller had accounted for all the spirits produced and if he failed to do so make an assessment for the difference between the quantity reported and the quantity shown to have been actually produced. The only remaining purpose of the account was to show the production and disposition of all spirits in the distillery and if all spirits were accounted for, no assessment was to be made. The return of a distiller serves the same purpose as the return required from any other person subject to excise taxes and heavy penalties are imposed for making a false or fraudulent return.

The reason for having the tax attach to alcohol as soon as this substance comes into existence as such was undoubtedly to establish the lien at that point, the purpose of the lien being, of course, to secure payment of the tax. The lien, very comprehensive in scope, continues until the tax is paid. If, however, the tax is not to be paid, as in the case of certain authorized withdrawals without payment of tax, the lien does not continue although there is no specific provision of law to this effect. Alcohol which has come into existence as such in a distillery may be further redistilled, separated as pure or impure spirit, transferred into other substances either "in the process of original production or by any subsequent process" (26 U. S. C. A. 1150 (c); Sec.

2800 (c) I. R. C.) (Appendix, p. 20). The alcohol may be used in the distillery for the production of gin, as in the instant case, without payment of the rectification tax (26 U. S. C. A. 1150 (a) (6); Sec. 2800 (a) (5)) or it may be reduced in the cisterns and taxpaid in the cistern room without being removed to the warehouse (Sec. 2883 I. R. C.) all of which indicates that whether or not the lien continues will depend on an ultimate accounting of the spirits.

It must be emphasized, however, that the tax does not become due, payable, collectible or assessable until the spirits are "withdrawn from bond". Petitioner agrees with the decision of the Court that the spirits in question were not withdrawn from bond but does not agree with the decision that the loss of the spirits in the distillery constituted a "removal from the place where distilled" and that the tax thereby became due under Section 1150 (b).

Petitioner has been unable to find any case or decision of the courts on the questions and points here presented. There are a number of decisions relating to losses sustained *in warehouse* and losses resulting in deficiency assessments but these have no direct application to the loss involved here. A word, however, must be said regarding the decision in *Seagram* v. *Smith, Collector,* 113 F. (2d) 357, an action previously instituted by petitioner involving a similar loss of whiskey. In that case, petitioner's employee failed to properly adjust the valves resulting in an overflow of whiskey from one of the cistern room tanks. The Circuit Court gave serious consideration as to when the production or distillation of spirits in a distillery is completed but found that "distillation was complete in the instant case and the tax liability attached". In holding that "The loss was one for which plaintiff must be held responsible", the Circuit Court did not point to the taxing provision under which the assessment was made, as the Court of Claims has done in this case, but referred to certain de-

cisions in support of its conclusions all of which can readily be distinguished from the case at bar and, although the objection may now appear to be somewhat late, had no application to the case before the Circuit Court. *U. S.* v. *Sisk,* 176 Fed. 85, was an action on the distiller's bond for failure to pay the tax within the statutory period; the spirits had been seized by the Collector and subsequently lost. The Court held that it was not necessary to show that the distiller had removed the spirits for the tax had not been paid within the period prescribed by law. *U. S.* v. *Cole,* 134 Fed. 697, was an action for the recovery of tax on brandy based on Section 1197 for failure to account, it having been shown that brandy had been produced from excess materials used. *Hart* v. *U. S.,* 95 U. S. 316, was an action on a distiller's bond, the Collector had allowed the distiller to remove spirits from the distillery without payment of the tax and judgment was allowed against the surety on the bond because such spirits had been removed without payment of tax and that the Government could not be held responsible for the wrongful acts of its officers.

The decisions referred to in the opinion of the Court of Claims (R. 10) can also be distinguished from the case at bar. In *Greenbrier* v. *Johnson,* 88 Fed. 638, and *Hamilton* v. *Kentucky, etc.,* 288 Fed. 326, there had been an actual and physical removal of the spirits. In *Mason* v. *Peabody,* Fed. Case No. 9250, decided in 1871, there was an assessment for deficiency because of loss due to leakage and fire and the distiller had failed to account for such spirits and judgment for the deficiency was granted. This decision was rendered prior to the Act of May 28, 1880 (26 U. S. C. A. 1198) allowing relief because of fire.

III.

The Court erred in holding that if 26 U. S. C. A. 1197 were applicable, petitioner is entitled to relief only if the spirits were lost without negligence on its part.

The argument set forth under "D" above is referred to in support of the above contention.

Respectfully submitted,

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APPENDIX.

"Revenue Act of 1918," Feb. 24, 1919, Sec. 600 as amended by "Liquor Taxing Act of 1934," Jan. 11, 1934, Sec. 2.

Tax Rate:—"There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

"On and after the effective date of Title I of the Liquor Taxing Act of 1934, $2.00 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon."

26 U. S. C. A. 1158 (b) (1); (Sec. 2809 (b) (1) I. R. C.)

Distilled Spirits:—"Distilled spirits, spirits, alcohol and alcoholic spirit, within the true intent and meaning of this chapter, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance."

26 U. S. C. A. 1150 (c); (Sec. 2800 (c) I. R. C.)

Time of Attachment:—"The tax shall attach to distilled spirits * * * as soon as this substance is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process."

26 U. S. C. A. 1150 (e); (Sec. 2800 (e) (1) I. R. C.)

Lien:—"The tax shall be a first lien on spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the lot or tract of land whereon the distillery is situated, and on any buildings thereon from the time said spirits are in existence as such until * * * the said tax is paid."

26 U. S. C. A. 1171; (Sec. 2820 I. R. C.)

Receiving Cisterns:—"* * * the owner, agent, or superintendent of any distillery * * * shall erect, in a room or building to be provided and used for that purpose, and for no other, and to be constructed in the manner to be prescribed by the Commissioner, two or more receiving cisterns, each to be at least of sufficient capacity to hold all the spirits distilled during the day of twenty-four hours, into which shall be conveyed all the spirits produced in said distillery; * * *. Such cisterns and the room in which they are contained shall be in charge and under the lock and seal of the storekeeper-gauger designated for that duty; * * *. On the third day after the spirits are conveyed into such cisterns they shall be drawn off into casks, under the supervision of such storekeeper-gauger and be removed directly to the distillery warehouse * * *."

26 U. S. C. A. 1168; (Sec. 2817 I. R. C.)

Survey of Distillery:—"On receipt of notice that any person * * * wishes to commence the business of distilling, the Collector, * * * shall proceed * * * to make a survey of such distillery for the purpose of estimating and determining its true spirit producing capacity for a day of twenty-four hours * * *.

"A written report of such survey shall be made in triplicate, of which one copy shall be delivered to the distiller, * * * and the survey shall take effect upon the delivery of such copy to the distiller. * * *

"The Secretary of the Treasury in the case of any distillery may, under regulations, waive such of the requirements of this section as he determines may be waived without danger to the revenue. * * *"

(*Note:* The Secretary did not waive the above provisions regarding the survey until by regulation (T. D. 4794) issued March 11, 1938 subsequent to the loss in question.)
26 U. S. C. A. 1192 (a); Sec. 2841 (a) I. R. C.)

Distillers' Books:—"Every person who makes or distills * * * shall keep a record, in the form and manner prescribed by the Commissioner, of the receipt on the distillery

premises, and the use thereon, of materials intended for use in the distillation of spirits, and of the number of gallons of spirits distilled, the number of gallons placed in the warehouse, and the proof thereof, the number of gallons sold or removed, with the proof thereof, and the name, place of business, and residence of the person to whom sold."

26 U. S. C. A. 1195; (Sec. 2844 I. R. C.)

Monthly production return of distiller:—"On the 1st day of each month, or within five days thereafter, every distiller shall render to the collector of the district an account in duplicate, taken from his books, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons and of proof gallons of spirits produced and placed in warehouse * * *. One of the said duplicate returns shall be transmitted by the Collector to the Commissioner."

26 U. S. C. A. 1197; (Sec. 2846 I. R. C.)

Assessment for deficiencies in production and excess of material used:—"On the receipt of the distiller's return in each month, the Commissioner shall inquire and determine whether the distiller has accounted for all the grain or molasses used, and all the spirits produced by him in the preceding month. If he is satisfied that the distiller has reported all the spirits produced by him, and the quantity so reported is found to be less than 80 per centum of the producing capacity of the distillery as estimated according to law, he shall make an assessment for such deficiency at the rate of tax imposed by law for every proof gallon. In determining the quantity of grain used, fifty-six pounds shall be accounted as a bushel; and if the Commissioner finds that the distiller has used any grain or molasses in excess of the capacity of his distillery as estimated according to law, he shall make an assessment against the distiller at the rate of tax imposed by law for every proof gallon of spirits that should have been produced from the grain or molasses so used in excess, which assessment shall be made whether the quantity of spirits reported is equal to or exceeds 80 per centum of the producing capacity of the distillery. *If the Commissioner finds that the distiller has not*

accounted for all the spirits produced by him, he shall, from all the evidence he can obtain, determine what quantity of spirits was actually produced by such distiller, and an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of tax imposed by law for every proof gallon. Provided, that the actual product shall be assumed to be in no case less than 80 per centum of the producing capacity of the distillery as estimated according to law. All assessments made under this section shall be a lien on all distilled spirits on the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the tract of land whereon the said distillery is located, and any buildings thereon, from the time such assessment is made until the same shall have been paid." (Italics ours.)

(*Note:* Under the Act of June 26, 1936, Sec. 302, authorizing the Secretary to waive the above survey requirements, (26 U. S. C. A. 1168) the Secretary was also authorized to relieve the distiller from such requirements of above Sec. 1197 and "of other provisions of law relating or incidental to survey requirements" as might be waived without danger to the revenue. Under Reg. or T. D. 4794, issued *March 11, 1938*, he also relieved distillers from the following requirements of the above Sec. 1197:

"(d). From so much of the provisions of * * * (U. S. C. 1934 Ed., Title 26, Sec. 1197), as make the distiller liable to an assessment for a deficiency in producing less than 80 per centum of the producing capacity of the distillery as estimated according to law; and as make him liable to an assessment for the tax upon the spirits that should have been produced from the materials found to have been used in excess of the capacity of the distillery for any month as estimated according to law."

Distillers were, however, not relieved from keeping books (26 U. S. C. A. 1192 (a)) and making the monthly return (26 U. S. C. A. 1195) and the Commissioner was not relieved from reviewing the distillers' accounting of spirits produced as directed by above Sec. 1197.)

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112804—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 334

JOSEPH E. SEAGRAM & SONS, INC., PETITIONER
v.
THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 7–10) is reported in 36 F. Supp. 1013.

JURISDICTION

The judgment of the Court of Claims was entered February 3, 1941 (R. 10). A motion for a new trial was denied May 5, 1941 (R. 10). The petition for a writ of certiorari was filed August 2, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether petitioner is entitled to recover the amount of internal revenue tax paid by it on distilled spirits lost in the cistern room of its distillery through the negligence of one of its employees.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 8–12.

STATEMENT

This is an action for the recovery of $1,453.20, which was the amount of internal revenue tax paid by petitioner at the rate of $2 per proof gallon on 726.6 proof gallons of distilled spirits (gin) lost on August 24, 1936. The spirits were lost when they overflowed one of the tanks in the cistern room of petitioner's distillery as a result of the negligence of an employee of petitioner in failing to adjust the valves controlling the flow of the spirits in the pipes leading from the gin house to the cistern room so that the spirits would be directed, as ordered, into a tank which was empty, instead of, as happened, into one which was full or nearly full (R. 6, 7, 9). The spirits had been distilled in the still house, after which they had been transferred to the gin house, where ingredients were added to give the gin flavor and where, apparently, a further distillation took place (R. 5). In any event, the distillation of the

spirits had been completed prior to their conveyance to the cistern room through the pipes mentioned (R. 8). The cistern room was located some 450 feet from the gin house (R. 5). The tanks or receiving cisterns in it were used to hold spirits produced by petitioner until, under the supervision of a storekeeper-gauger employed by the Government and in charge of the key to the room as required by law, the spirits were withdrawn for deposit and entry in a warehouse (R. 4–5).

After reporting the loss, petitioner was assessed with the tax and payment was demanded (R. 6). Thereafter, on November 2, 1936, petitioner paid the tax under protest and filed a claim for refund, which was rejected on August 10, 1937 (R. 6). The petition in the court below was filed two years later (R. 1). The court below dismissed the petition, holding that the tax was properly assessed and collected (R. 9–10).

ARGUMENT

The decision of the court below is in accord with that of the Circuit Court of Appeals for the Seventh Circuit upon substantially identical facts in *Joseph E. Seagram & Sons* v. *Smith*, 113 F. (2d) 357. Cf. *Mason* v. *Peabody*, 16 Fed. Cas. 1060–1061. No conflict of decisions exists or is asserted and we submit that the decision of the court below is correct.

1. Paragraph (a) of Section 600 of the Revenue Act of 1918 (40 Stat. 1105), as amended by Section 900 (a) of the Revenue Act of 1926 (44 Stat. 104) and Section 2 of the Liquor Taxing Act of 1934 (48 Stat. 313), in force during 1936, provides that an internal revenue tax at the rate of $2 per proof gallon "shall be levied and collected on all distilled spirits now in bond or * * * hereinafter produced in * * * the United States * * * to be paid by the distiller * * * when withdrawn, and collected under the provisions of existing law." Section 3248 of the Revised Statutes specifies that "the tax shall attach to this substance [i. e., distilled spirits] as soon as it is in existence as such * * *." Section 3253 of the Revised Statutes provides:

> SEC. 3253. The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time when knowledge of such fact is obtained by the Commissioner of Internal Revenue, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law.

In dismissing the petition the court below relied upon the foregoing provisions as they appear, with some variations not here material, in Section 1150 (a) (1), (c), and (b), respectively, of Title 26 of the United States Code (1934 Ed.). It held that since the ~~distribution~~ distillation of the distilled spirits which were lost had been completed, they had come into "existence as such" and that accordingly the tax had attached (R. 8). It further held that payment of the tax was required under Section 3253, above quoted, there being no statute creating an exception in the case of spirits lost or destroyed in being removed to the cistern room (R. 9).

Petitioner concedes (Br. 11), as it must, that the tax had attached. See *Thompson* v. *United States,* 142 U. S. 471, 475; *United States* v. *Rizzo,* 297 U. S. 530, 533; *Greenbrier Distillery Co.,* v. *Johnson,* 88 Fed. 638 (C. C. A. 6). But it contends (Br. 9–10) that the tax was not assessable or due under Section 3253 because the spirits had not been "removed from the place where they were distilled." However, since the spirits were distilled in the still house, the process being completed either there or in the gin house (R. 5, 8), as is undisputed, it would appear that they were "removed from the place where they were distilled" when they were transferred from the still house to the gin house, or, if not then, when they were con-

veyed from the gin house to the cistern room.[1] If a removal outside the distillery inclusive of the cistern room were required before the tax could be assessed, as is urged by petitioner, it would have been unnecessary for Congress to have provided, as it later did, that in cases of certain deficiencies in production, the tax should not be assessed against spirits destroyed "in process of manufacture or distillation, or before removal to the distillery warehouse," when such destruction was caused by accidental fire or casualty without negligence on the part of the distiller. Act of March 1, 1879, c. 125, Sec. 6, 20 Stat. 340, as amended by the Act of May 28, 1880, c. 108, Sec. 8, 21 Stat. 147.

2. Petitioner also contends (Br. 10–19) that the court below erred in holding Section 3309 of the Revised Statutes, as amended, inapplicable. But that section, referred to by petitioner and the court as Section 1197 of Title 26 of the United States Code, relates to the assessment of the tax

[1] The record does not show what happened to the spirits here involved after they overflowed the tank in the cistern room, except that they were "lost." If, as is probable, they were carried off as waste or otherwise disposed of outside the plant, such might well have been a removal within the meaning of Section 3253 even as interpreted by petitioner. Moreover, whether or not they were removed within the meaning of Section 3253, it might be argued that when they were lost they were "withdrawn" within the meaning of Section 600 (a) of the Revenue Act of 1918, as amended, and hence properly taxed thereunder.

for deficiencies in failing to produce 80 percent of the producing capacity of the distillery, or in failing to produce, if materials in excess of capacity were used, the number of gallons that should have been produced therefrom. No such assessment or deficiency is involved in this case. The court found and the finding is undisputed that petitioner produced more than the required percentage, exclusive of the 726.6 gallons lost (R. 6). Moreover, even if the loss had resulted in a deficiency for which an assessment was made, petitioner's claim for recovery would not be advanced, since the loss did not occur "without any * * * negligence" of the distiller as required by the provisions cited at the end of the foregoing paragraph, referred to by the court as Section 1198 of Title 26 of the United States Code (R. 9).

CONCLUSION

The decision of the court below is correct. No important principle of law is involved and there is no conflict of authority. The petition should be denied.

Respectfully submitted.

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SEPTEMBER 1941.

APPENDIX

Revenue Act of 1918, c. 18, Sec. 600, 40 Stat. 1057, as amended by Sec. 900 (a), Revenue Act of 1926, 44 Stat. 104, and Sec. 2, Liquor Taxing Act of 1934, 48 Stat. 313:

> SEC. 600. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:
>
> * * * * *
>
> (4) On and after the effective date of Title I of the Liquor Taxing Act of 1934, $2.00 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.
>
> * * * * *

Revised Statutes:

> SEC. 3248. Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated

as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

SEC. 3253. The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time, when knowledge of such fact is obtained by the Commissioner of Internal Revenue, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law.

SEC. 3309 [as amended by Sec. 5, Liquor Taxing Act of 1934, 48 Stat. 313]. On the receipt of the distiller's return in each month, the Commissioner of Internal Revenue shall inquire and determine whether the distiller has accounted for all the grain or molasses used, and all the spirits produced by him in the preceding month. If he is satisfied that the distiller has reported all the spirits produced by him, and the quantity so reported is found to be less than eighty per centum of the producing-capacity of the distillery as estimated according to law, he shall make an assessment for such deficiency at the rate of tax imposed by law for every proof-gallon. In determining the quantity of grain used, fifty-six pounds shall be accounted as a bushel; and if the Commissioner finds that the distiller has used any grain or molasses

in excess of the capacity of his distillery as estimated according to law, he shall make an assessment against the distiller at the rate of tax imposed by law for every proof-gallon of spirits that should have been produced from the grain or molasses so used in excess, which assessment shall be made whether the quantity of spirits reported is equal to or exceeds eighty per centum of the producing-capacity of the distillery. If the Commissioner finds that the distiller has not accounted for all the spirits produced by him, he shall, from all the evidence he can obtain, determine what quantity of spirits was actually produced by such distiller, and an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of tax imposed by law for every proof-gallon: *Provided*, That the actual product shall be assumed to be in no case less than eighty per centum of the producing-capacity of the distillery as estimated according to law. All assessments made under this section shall be a lien on all distilled spirits on the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the tract of land whereon the said distillery is located, and any building thereon, from the time such assessment is made until the same shall have been paid.

Act of March 1, 1879, Sec. 6, 20 Stat. 340, as amended by the Act of May 28, 1880, Sec. 8, 21 Stat. 147:

SEC. 6. That whenever, under the provisions of section thirty-three hundred and nine of the Revised Statutes, an assessment

shall have been made against a distiller for a deficiency in not producing eighty per centum of the producing capacity of his distillery as established by law, or for the tax upon the spirits that should have been produced from the grain, or fruit, or molasses found to have been used in excess of the capacity of his distillery for any month, as estimated according to law, such excessive use of grain, or fruit, or molasses having arisen from a failure on the part of the distiller to maintain the capacity required by law to enable him to use such grain, or fruit, or molasses without incurring liability to such assessment, and it shall be made to appear to the satisfaction of the Commissioner of Internal Revenue that said deficiency, or that said failure, whereby such excessive use of grain, molasses, or fruit arose, was not occasioned by any want of diligence or by any fraudulent purpose, on the part of the distiller, but from misunderstanding as to the requirements of the law and regulations in that respect or by reason of unavoidable accidents, then, and in such case, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury is authorized, on appeal made to him, to remit or refund such tax, or such part thereof as shall appear to him to be equitable and just in the premises. And the Commissioner of Internal Revenue upon the production to him of satisfactory proof of the actual destruction, by accidental fire or other casualty, and without any fraud, collusion, or negligence of the distiller of any spirits in process of manufacture or distillation, or before removal to the distillery warehouse, shall not assess the distiller for a deficiency

in not producing eighty per centum of the producing capacity of his distillery as established by law when the deficiency is occasioned by such destruction, nor shall he, in such case, assess the tax on the spirits so destroyed: *Provided,* That no tax shall be remitted or refunded under the provisions of this section upon any assessment made prior to January first, eighteen hundred and seventy-four: *Provided further,* That no assessments shall be charged against any distiller of fruit for any failure to maintain the required capacity, unless the Commissioner shall, within six months after his receipt of each monthly report notify such distiller of such failure so to maintain the required capacity.

U. S. GOVERNMENT PRINTING OFFICE: 1941